[Cite as *Karr v. Ohio Dept. of Transp.*, 2014-Ohio-5891.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
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MARY M. (PEGGY) KARR

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2013-00703-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Mary M. (Peggy) Karr, filed this action against defendant, Ohio Department of Transportation ("ODOT"), which stated: "[W]hile driving on SR 23 south after exiting from 270 (on the East side of Columbus), I drove under the 270 overpass where a torrent of dirty, cement-colored wet debris fell from the overpass onto my car. I stopped and noted that my car was dirty on the driver side from the front to the back. I went to a car wash that afternoon. The material did not wash off completely with one wash. On Friday, November 15, noticed a vertical crack in my windshield on the passenger side. Upon close examination, I discovered that the crack extended horizontally across the windshield to the driver's side. The horizontal crack is in the shaded area, barely visible. There are two pin-hole size 'dings' at the beginning of the crack on the driver side. The debris falling from the overpass where construction activity was occurring caused a cracked windshield." Plaintiff noted the damage-causing incident occurred on November 7, 2013 at approximately 3:00 p.m.

{¶2} Plaintiff seeks damages between $350 to $400, but did not provide a copy of a receipt or quote with her original complaint. Plaintiff submitted the $25.00 filing fee with the complaint.

{¶3} Defendant filed an investigation report requesting that plaintiff provide documentation to substantiate her claim amount in the form of a copy of a quote, invoice, receipt, etc. Further, defendant denied liability for plaintiff's property damage based on the contention that this project was under the control of Completed General Construction Company ("Complete") and neither Complete, nor the defendant, had any notice of this hazardous condition prior to plaintiff's incident.

{¶4} Defendant's investigation indicated that the location of the plaintiff's incident "would be between mileposts 5.04 and 5.07 going southbound on US 23 in Franklin County." Defendant determined the roadway where plaintiff's incident occurred was within the limits of a working construction project under the control of ODOT contractor, Complete. Defendant explained the construction project "is for improving section FRA-270-52.72, Interstate Route 270 in Franklin County, Ohio, in accordance with plans and specifications by reconstruction of the mainline pavement and adding capacity in the Median using either asphalt concrete or concrete paving." Defendant contended that it "received zero (0) complaints concerning concrete slurry from construction work on IR-270 in the area of the incident in the six (6) months prior to plaintiff's incident."

{¶5} Defendant asserted that this particular construction project was under the control of Complete and, consequently, ODOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant argued that Complete, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, ODOT contended that Complete is the proper party defendant in this action.

{¶6} Defendant implied that all duties such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects were delegated when an

independent contractor takes control over a particular section of roadway. All construction work was to be performed in accordance with the contract between ODOT and Complete which "entitled ODOT to rely on their independent contractor to perform work properly and in a workman like manner." Therefore, any "failure on the part of Complete General Construction Company cannot be imputed to ODOT." Furthermore, defendant contended that plaintiff failed to introduce sufficient evidence to prove her damage was proximately caused by roadway conditions created by ODOT or its contractors.

{¶7} Finally, defendant asserted that neither ODOT nor Complete had notice of any debris on US 23 prior to plaintiff's incident.

{¶8} Defendant contacted independent contractor, Complete, and it reported: "CGC does not deny that concrete slurry may have leaked off of the bridge on November 7, 2013. As a result, CGC is ready and willing to reimburse cleaning costs to all drivers who can provide sufficient proof that they were in the area on the day in question and had concrete slurry on their vehicle. However, Mrs. Karr's claim for a damage [sic] windshield must be denied. First, concrete slurry is nothing more than dirty water. The only difference between normal water and concrete slurry is a higher pH caused by the inclusion of very fine concrete particles. This can be bolstered by the facts found during our investigation of Mr. Wernimont's for claim for damage the same day. (See Exhibit D). Mr. Wernimont's vehicle sustained no damage due to the concrete slurry, and the photos show nothing more than a dirty car that was fixed with a $4.75-trip to the carwash. Second, CGC installed falsework under the structures in order to protect the traveling public from falling debris. The falsework consists of a plywood structure installed underneath the bridge deck. This plywood structure prevents any debris from falling and reaching the roadway. However, the plywood is not waterproof; thus, it is possible for slurry to drip out. But, it was still not possible for solid debris to reach the roadway. Third, Mrs. Karr continued to drive her car for one week after she sustained the alleged

damage. There are endless possible alternative theories as to how her window was cracked in that time, but it makes it impossible to prove that the slurry was the cause of the damage. Because the damage discovery is so far removed from the date of the actual incident, it is impossible to determine the actual cause of damage; thus, this claim must be denied."

{¶9} Plaintiff filed a response to defendant's investigation report disagreeing with several of its assertions. Plaintiff refuted defendant's statement: "[r]egardless, the evidence indicates that neither ODOT nor Complete General Construction Company were aware of the pothole going westbound before the entrance ramp to US 23." Plaintiff asserted that she "does not allege that damage to the Plaintiff's vehicle was caused by a pothole in the roadway." Second, plaintiff disagreed with defendant's contention that it had zero complaints in the 6 months prior to her incident. She argued that defendant and Complete had received a complaint from Mr. Wernimont regarding concrete slurry on the same day of her incident. Plaintiff provided an invoice for windshield replacement in the sum of $379.67 as well as photos of the horizontal and vertical crack. Plaintiff explained why the cracked windshield went unnoticed for one week. She asserted that she drove through a $10.00 car wash when she reached her destination on the day of the incident and had to drive through another $10.00 car wash the day after the incident because "gray matter was still visible on the vehicle. . . After this action, some remnants of the gray matter remained. No inspection of the windshield was made at this time. Plaintiff further states that the damage was not visible until a horizontal crack travelled vertically. The windshield of the Plaintiff's vehicle has a defrost section across the bottom. The area is five inches from bottom to top and is shaded black. The shaded area is not visible to the driver of the vehicle. One week after the incident, the morning of Friday November 1, the crack became visible on the passenger side of the vehicle. It was a vertical crack. A close inspection revealed that the crack originated on the driver side of the windshield, from two small dings in the black shaded

area. The crack had travelled horizontally across the bottom of the windshield, in the black shaded area, and did not become visible to Plaintiff until it moved vertically, up the windshield, and out of the black shaded area."

CONCLUSIONS OF LAW

{¶10} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Company, Inc.,* 99 Ohio St. 3d 79, 2003-Ohio-2573,788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.,* 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984). Plaintiff has the burden of proving, by a preponderance of the evidence, that she suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University*, 76-0368-AD (1977). However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.*, 145 Ohio St. 198, 61 N.E. 2d 198 (1945), approved and followed.

{¶11} Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App. 2d 335, 361 N.E. 2d 486 (10th Dist. 1976). However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford*, 112 Ohio App. 3d 189, 678 N.E. 2d 273 (10th Dist. 1996); *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App. 3d 723, 588 N.E. 2d 864 (10th Dist. 1990). The duty of ODOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. ODOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151.

{¶12} Despite defendant's contentions that ODOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the construction site and correct any known deficiencies in connection with the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.*, 10th Dist. No. 00AP-1119 (June 28, 2001).

{¶13} Defendant denied that either ODOT or Complete had any notice of cement slurry on US 23 (from construction on IR-270) prior to plaintiff's property-damage event. Defendant advised that no complaints were received from other motorists regarding cement slurry prior to plaintiff's incident. The record is devoid of any proof that Mr. Wernimont's complaint was received prior to plaintiff's incident. Often, complaints are not filed immediately following the incident. In fact, according to the records provided by defendant, the complaint regarding plaintiff's November 7, 2013 incident was not received until November 22, 2013. Also, defendant contended plaintiff failed to offer any evidence to establish her damage was attributable to any conduct on either the part of ODOT or Complete. Defendant further contended plaintiff failed to produce any evidence to prove the construction area was negligently maintained.

{¶14} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether ODOT acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.*, 114 Ohio App. 3d 346, 683 N.E. 2d 112 (10th Dist. 1995). In fact, the duty to render the highway free from an unreasonable risk of harm is the precise duty owed by ODOT to the traveling public both under normal traffic and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.*, 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462 (1990).

{¶15} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident.

McClellan v. ODOT, 34 Ohio App. 3d 247, 517 N.E. 2d 1388 (10th Dist. 1986). Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E. 2d 1179 (Ct. of Cl. 1986). Plaintiff has provided no such evidence regarding prior notice.

{¶16} Defendant liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively caused such condition. See *Bello v. City of Cleveland*, 106 Ohio St. 94, 138 N.E. 526 (1922), at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation*, 94-13861 (1996). Plaintiff has failed to produce any evidence to prove that her property damage was caused by a defective condition created by ODOT/Complete or that defendant knew about the particular condition prior to approximately 3:00 p.m. on November 7, 2013.

{¶17} Ordinarily, to recover in any suit involving injury proximately caused by roadway conditions including debris (cement slurry), plaintiff must prove either: 1) defendant had actual or constructive notice of the roadway condition and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation*, 75-0287-AD (1976). Plaintiff has not provided any evidence to prove ODOT had actual notice of the damage-causing condition. As noted above, admission of another incident that occurred on the same day does not prove prior notice. Therefore, in order to recover plaintiff must offer proof of defendant's constructive notice of the condition or evidence to establish negligent maintenance.

{¶18} "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle*, 90 Ohio App. 195, 197-198, 105 N.E. 2d 429 (6th Dist. 1950). "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set time standard for the discovery of certain road hazards."

Bussard, at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.*, 10th Dist. No. 92AP-1183 (Feb. 4, 1993). In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation*, 78-0126-AD (1978).

{¶19} Plaintiff has not produced any evidence to indicate the length of time that the road condition (cement slurry) was present on the roadway prior to the incident forming the basis of this claim. Also, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time that the debris appeared on the roadway. *Spires v. Ohio Highway Department*, 61 Ohio Misc. 2d 262, 577 N.E. 2d 458 (Ct. of Cl. 1988). There is no indication that defendant had constructive notice of any hazardous condition on the roadway.

{¶20} Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition or conditions. *Herlihy v. Ohio Department of Transportation*, 99-07011-AD (1999). However, Complete did not deny that cement slurry "may have leaked off of the bridge on November 7, 2013," causing vehicles to become spotted or covered in the substance. Complete went so far as to states it is "ready and willing to reimburse cleaning costs to all drivers who can provide sufficient proof that they were in the area on the day in question and had concrete slurry on their vehicle." Plaintiff has contended that her vehicle was covered in concrete slurry, requiring two $10.00 car washes. She provided no documentation substantiating the costs of the car washes. However, the assessment of damages is a matter within the province of the trier of fact. *Litchfield v. Morris*, 25 Ohio App. 3d 42, 495 N.E. 2d 462 (10th Dist. 1985). As trier of fact, this court has the power to award reasonable damages based on evidence presented. *Sims v.*

Southern Ohio Correctional Facility, 61 Ohio Misc. 2d 239, 577 N.E. 2d 160 (Ct. of Cl. 1988).

{¶21} Plaintiff has proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, and that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff has shown that the damage-causing cement slurry was connected to conduct under the control of defendant or any negligence on the part of defendant, which proximately caused the damage. *Herman v. Ohio Dept. of Transp.*, 2006-05730-AD (2006); *Husak v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-03963-AD, 2008-Ohio-5179. As such, the court awards the plaintiff $20.00 plus $25.00 for reimbursement of the filing fee pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E. 2d 990 (Ct. of Cl. 1990).

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ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $45.00, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Interim Clerk

Entry cc:

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